

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Market Disputes Resolution Division
445 12th St., S.W.
Washington, D.C. 20554

December 15, 2016

Copies sent by E-mail

NOTICE OF FORMAL COMPLAINT

**THIS LETTER CONTAINS IMPORTANT INFORMATION REGARDING
FILING DEADLINES AND PROCEDURES. PLEASE REVIEW IT
CAREFULLY.**

ESI,)	
)	
Complainant,)	
)	
v.)	Proceeding Number 16-407
)	Bureau ID Number EB-16-MD-005
)	
AT&T, Corp.)	
)	
Defendant.)	

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Counsel for Defendant

Re: Notice of Complaint – *ESI v. AT&T, Corp.*

Dear Counsel:

On December 13, 2016, Complainant ESI filed with this Commission a formal complaint against defendant AT&T under section 208 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 208.¹ A copy of the Complaint is being sent to AT&T by email with this letter. See 47 C.F.R. § 1.735(d). AT&T should already have a copy of the Complaint as served by hand delivery by ESI. See 47 C.F.R. § 1.735(c). If that is not the case, AT&T should immediately contact the Commission counsel identified below.

The Commission has promulgated comprehensive rules regarding formal complaints. See 47 C.F.R. §§ 1.720-1.736. See also *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997) (*Formal Complaints Order*), Order on Reconsideration, 16 FCC Rcd 5681 (2001) (*Formal Complaints Recon Order*). See also *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act*, Order, 29 FCC Rcd 14078 (2014) (*Formal Complaints Amendment Order*). We strongly encourage the parties to read the formal complaint rules, the *Formal Complaints Order*, the *Formal Complaints Recon Order*, and the *Formal Complaints Amendment Order* fully and carefully.

Pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3, 1.724, 1.726, 1.729, and 1.733 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.724, 1.726, 1.729, 1.733, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, we modify and extend certain of the filing deadlines and other requirements set forth in the formal complaint rules, as specified below:

We waive the portions of sections 1.726(a) and 1.729(a) of the Commission's rules that limit the complainant to addressing, in its reply and supplemental interrogatories, only the "specific factual allegations and legal arguments made by the defendant *in support of its affirmative defenses*." 47 C.F.R. §§ 1.726(a), 1.729(a) (emphasis added). Instead, **ESI must file a reply**, and the reply **must** address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. The supplemental interrogatories (if any) may address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. This waiver will expedite our consideration of this matter by accelerating the creation of a full record. During the initial status conference, we will, as always, consider any request by AT&T for an opportunity to respond to the reply.

We also waive the portions of sections 1.724(c) and 1.726(c) of the Commission's rules that require an answer and reply to contain proposed findings of fact and conclusions of law. Experience has shown that proposed findings of fact and conclusions of law included in these pleadings are of limited value. The answer and reply still must include comprehensive factual support and a thorough legal analysis, as required in sections 1.724(b)-(c) and 1.726(a), (c) of the Commission's rules.

In accordance with the formal complaint rules, as modified above:

¹ *ESI v. AT&T Corp.*, Bureau ID. No. EB-16-MD-005, Proceeding No. 16-407 (filed Dec. 13, 2016) (Complaint).

- 1) On or before **January 13, 2017**, AT&T shall file and serve its request for interrogatories, if any. 47 C.F.R. § 1.729.
- 2) AT&T shall, on or before **January 13, 2017**, file and serve an answer to the complaint that complies with this Notice of Formal Complaint and 47 C.F.R. § 1.724.²
- 3) ESI shall, on or before **January 23, 2017**, file and serve a reply to the answer that complies with 47 C.F.R. § 1.726.
- 4) ESI shall, on or before **January 23, 2017**, file and serve a request for interrogatories, if any, and file and serve any opposition and objections to AT&T's request for interrogatories, if any. 47 C.F.R. § 1.729.
- 5) AT&T shall, on or before **January 30, 2017**, file any opposition and objections to ESI's second request for interrogatories, if any. 47 C.F.R. § 1.729.
- 6) An initial status conference in this proceeding has been scheduled for **February 22, 2017 at 10:00 am** at the Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. We strongly encourage each party to have present at the conference a client representative with knowledge of the central facts and authority to settle the dispute. After clearing security at the 12th Street entrance, the parties should call Lia Royle at 418-7391 to be escorted to the conference. See 47 C.F.R. § 1.733. The parties also should be prepared to spend at least four hours in conference.
- 7) The parties shall meet prior to attending the initial status conference. One purpose of that meeting is to resolve or narrow as many issues as possible prior to the conference. The parties shall discuss matters including, but not limited to, settlement prospects, discovery, factual and legal issues in dispute, pleading schedules, and the creation of a joint statement of stipulated facts, disputed facts, and key legal issues. See 47 C.F.R. § 1.733(b)(1).
- 8) The parties shall file a joint statement of all proposals agreed to and any disputes remaining with respect to the matters listed in 47 C.F.R. § 1.733(b)(1)(i)-(iv) as a result of the parties' meeting. At the same time, the parties also shall submit a joint statement of stipulated facts, disputed facts, and key legal issues. See 47 C.F.R. §§ 1.732(g), 1.733(b)(1)(v), 1.733(b)(2). Both joint statements must be filed and served on or before **February 9, 2017**. See 47 C.F.R. § 1.733(b)(2). The parties may submit these two joint statements in a single document, as long as each is separately identified therein. **We strongly encourage the parties to devote substantial effort to developing comprehensive and detailed joint statements.** See *Formal Complaints Recon Order*, 16 FCC Rcd at 5696-97.

² Except in rare circumstances, *motions to dismiss should not be filed*. *Formal Complaints Recon Order*, 16 FCC Rcd at 5696 ("We find this practice of filing a separate motion to dismiss to be unnecessary, in virtually all cases...[T]he Commission's rules are designed so that a defendant's answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint...[W]e remind defendants that the grounds for a motion to dismiss ordinarily should be raised in the answer alone rather than in a separate pleading.").

9) The parties shall file a public version of all written submissions in this proceeding using the Commission's Electronic Comment Filing System (ECFS). All written submissions shall (a) prominently contain the Proceeding Number and Bureau Id Number referenced above (*see, e.g.*, 47 C.F.R. § 1.7), and (b) be addressed to the Commission Secretary. If a party seeks to file both a public version and a confidential version of a submission, it must file the public (redacted) version on ECFS and file the confidential (unredacted) version in hard copy form with the Office of the Commission Secretary. *See* 47 C.F.R. § 1.731. In addition to filing the unredacted version with the Office of the Secretary, please leave at that office three additional unredacted hard copies marked as "Courtesy Staff Copies. EB-MDRD, 202-418-7330". *See* 47 U.S.C. § 154(i); 47 C.F.R. § 1.735(e). The parties shall serve on one another all filings via e-mail, hand-delivery, or overnight delivery, together with a proof of all such service. *See* 47 C.F.R. § 1.735(f). In addition, the parties shall send to the Commission staff identified below email courtesy copies of all filings (both public versions and confidential versions) in a format that permits full text searching. *See* 47 U.S.C. § 154(i); 47 C.F.R. § 1.735(e). *See Formal Complaints Amendment Order*, 29 FCC Rcd at 14081, para. 11 (requiring parties to provide hard copies of submissions to Commission staff upon request).

The parties should note that this proceeding is restricted for *ex parte* purposes pursuant to 47 C.F.R. Part 1, Subpart H. Further, the parties shall retain all records that may be relevant to the complaint, including electronic records, until the Commission's decision in this proceeding is final and no longer subject to judicial review. *See* 47 U.S.C. §§ 154(i), 208(a); 47 C.F.R. § 42.7.

Commission staff assigned to this matter are: Lisa Saks (counsel) (202) 418-7335 and lisa.saks@fcc.gov, and Lia Royle (counsel), (202) 418-7391 and lia.royle@fcc.gov; and Sandra Gray-Fields (administrative): (202) 418-0961 and sandra.gray-fields@fcc.gov.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3 and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION



Lisa J. Saks, Assistant Division Chief,
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